1969

Stephen Frank Hyde v. Lauri Lee Hyde : Respondent's Brief

IN THE SUPREME COURT
OF THE STATE OF UTAH

STEPHEN FRANK HYDE,
Plaintiff and Respondent,

vs.

LAURI LEE HYDE,
Defendant and Appellant,

Case No.
11463

RESPONDENT'S BRIEF

APPEAL FROM A JUDGMENT
OF THE SECOND JUDICIAL DISTRICT
HONORABLE THORNLEY K. SWAN, JUDGE

J. Duffy Palmer, of

HESS, PALMER &
VAN WAGENEN
40 South 125 East
Clearfield, Utah 84015

*Attorneys for Plaintiff-
Respondent*

Robert C. Matheson and
Thomas R. Blonquist, of

BURTON, BLONQUIST,
CAHOON, MATHESON &
SHAFFER
Suite 640 Kennecott Bldg.
Salt Lake City, Utah 84111

*Attorneys for Defendant
Appellant*

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STATEMENT OF THE KIND OF CASE

This is a divorce action which was commenced in January, 1968, by the Plaintiff (respondent) Stephen Frank Hyde, against the defendant (appellant) Lauri Lee Hyde. The plaintiff sought custody of the minor child of the parties and an equitable distribution of the property.

DISPOSITION IN LOWER COURT

Many hours of testimony, evidence, and arguments having been received and considered, the trial court entered it's decree that the plaintiff be granted a divorce from the defendant and that the plaintiff be awarded the care, custody, and control of the parties' minor child subject to the defendant's right of reasonable and liberal visitation.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the decision of the lower court affirmed, and to recover his costs incurred as a result of this appeal.

STATEMENT OF FACTS

The plaintiff essentially agrees with the statement of facts as set forth in the defendant's brief. However, there are a few points which plaintiff feels need to be corrected and clairified.

The defendant left the home of the parties on November 2, 1967, "to go to Phoenix for a vacation for two weeks." (TR. p. 118, 2-4) She had stated that her family obligations were getting too much for her, and that she was under such stress that she had to get away for a couple of weeks. (TR. p. 117, 30 and TR. p. 118, 1-2) She indicated that at the time she felt that she was losing all identity, and that no one really cared too much about her, or what happened to her, or what she did. (TR. p. 5, 20-24).

When the defendant left for her two-week vacation, she had not made arrangements for the care of the minor child. The subject had been discussed by the parties, but the plaintiff was actually left with the full responsibility to make any arrangements for the care of the child. (TR. p. 124) While the defendant was in Phoenix, the plaintiff did have the defendant's mother care for the child during the time he was at work or at school, but all other times he had the complete care of the child. He fed her, clothed her, changed her, put her to bed, and washed and cared for his minor daughter. (TR. p. 120-121).

The plaintiff traveled to Phoenix at the end of December, 1967, and talked with the defendant in an attempt to

determine if she was going to return. At that time, the defendant stated that she was not ready to come back yet; that she did not know how long before she might even want to come back; and that she may never want to come back. (TR. p. 118) At this point the plaintiff retained counsel and filed this divorce action on or about January 9, 1968. The defendant still chose to reside in Phoenix, Arizona, until she returned on April 14, 1968, more than five and one-half months after she had departed.

The defendant's statement of fact setting forth the legal proceedings before the trial court is essentially correct.

PLAINTIFF'S POSITION

The trial court's decision should be affirmed and the plaintiff should retain custody of his daughter who has been in his care, custody, and control since November 2, 1967, for the following reasons:

1. This was an action for divorce and not one for separation, therefore, the provisions of 30-3-5 UCA, 1953, controlled and directed the trial court with respect to what orders it made in relation to the custody of the child. The court could, therefore, make any order in relation to the child concerned as it found to be equitable. The provisions of 30-3-10 UCA, 1953, which apply to cases involving separation did not apply and the plaintiff was not, therefore, under the burden to prove that the defendant was an immoral, imcompetent, or otherwise improper person.

2. Even if the provisions of 30-3-10 UCA, 1953, were held to be controlling, or of considerable weight, in providing the proper standard for determining which parent should receive the care, custody, and control of the minor child of the parties, the plaintiff presented to the court sufficient evidence to sustain the court's findings of fact that the defendant was

an unfit and improper person to have the custody of the minor child.

ARGUMENT

POINT I.

THE TRIAL COURT AWARDED THE PLAINTIFF CUSTODY OF THE MINOR CHILD BECAUSE THE EVIDENCE INDICATED THAT SUCH AN AWARD OF CUSTODY TO THE FATHER WAS EQUITABLE AND IN THE BEST INTERESTS OF THE CHILD.

This being an action for divorce, the trial court was authorized by 30-3-5, UCA, 1953, to make such orders in relation to the minor child of the parties as it determined to be equitable and in the best interests of the child.

The defendant contends that the plaintiff had the burden of proving the defendant is an unfit mother and that the plaintiff failed to meet this burden. This contention, if true, would mean that 30-3-10, UCA, 1953, controlled any order of the trial relative to custody of children in divorce cases rather than 30-3-5, UCA, 1953.

The Utah Supreme Court in the case of Johnson vs. Johnson, 7 Utah 2d 263, 323 P. 2d 16 (1958) had indicated that in divorce proceedings a father may be awarded custody of a child under the age of 10 years without the necessity for the court to find that the mother was an unfit parent. Justice Crockett stated:

> "The question thus posed was treated in extenso in Sampsell vs. Holt, (115 Utah 73, 202 P. 2d 550, 552.) wherein Justice Wolfe pointed out the distinction between 30-3-10 which by its language concerns cases of 'separation'

whereas Section 30-3-5 is expressly applicable to 'divorce'. It being, 'When a decree of divorce is made the court may make such orders in realtion to the children, *** as may be equitable. ***"

The law with respect to this issue is well summarized by Chief Justice McDonough in the recent case of Steiger vs. Steiger (4 Utah 2d 273, 293 P. 2d 418, 420.)

"This court has stated that a divorced mother has no absolute right to the custody of minor children *** but the policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the mother in awarding custody of a child of tender years, *** and this view is based upon the oft-stated purpose of the award of custody to provide for the child's best interests and welfare.***"

"The instant case is a good example of the undesirable and impractical results that would emanate from adopting the view urged by plaintiff that the court must invariably, in all circumstances, awarding the custody of children under 10 to the mother unless she is found to be an immoral or imcompetent person; it likewise exemplifies the wisdom of the prior adjudications of this court that questions of custody are always equitable and that the controlling consideration is the welfare of the children involved."

The Supreme Court in the case of Ryan vs. Ryan, 17 Utah 2d 44, 404 P. 2d 247 (1965) where children under 10 years of age were concerned, determined that there did not seem to be evidence to find that the mother was an immoral person, but determined that it was in the best interests of the children that the father be awarded custody.

The Utah legislature saw fit to pass two separate statutes regarding the custody of children. Section 30-3-10 indicates that when parents separated, the mother of any children under 10 years of age should,

> "be entitled to the care, control and custody of all such children ... provided further, that if it shall be made to appear to a court of competent jurisdiction that the mother is immoral, incompetent or otherwise an improper person, then the court may award the custody of the children to the father ..."

On the other hand, the legislature stated in Section 30-3-5:

> "When a decree of divorce is made the court may make such orders in relation to the children, ... as may be equitable ..."

The Utah Supreme Court in considering these two sections has previously stated that 30-3-5 applies in cases of divorce and 30-3-10 applies in cases of separation, It has ruled that in granting a decree of divorce, the question of child custody is always equitable and that the controlling consideration is the welfare of the children involved. Johnson vs. Johnson, supra; Sampsell vs. Holt, supra; Steiger vs. Steiger, supra; Wolton vs. Coffman, 110 Utah 1, 169 P. 2d 97 (1946); Smith vs. Smith, 1 Utah 2d 75, 262 P. 2d 283 (1953). There appears a just and valid reason why the court should continue to observe the distinction between the two sections provided by the legislature. Under conditions of separation where the rights of the parties have not been fully determined the presumption that the mother should have the custody of children under 10 years of age, unless it is proven that she is immoral, incompetent or improper person, probably is based upon sound reasoning. On the other hand, when a divorce decree is entered and the rights of the parties and the children

are finally adjudicated, there also appears to be sound reasoning that any order relative to minor children should be based upon equity, thus allowing either the father or mother to be awarded custody, with the prime and controlling factor being the best interest and welfare of the child.

The factual evidence in the instant case which sustains the trial court and indicates that it is in fact in the best interests of the minor child that she be in the custody of her father also proves that the mother is unfit and is an improper person to have custody of said child. In an effort to avoid repetition this evidence will be reviewed under Point II as hereafter set forth.

POINT II

PLAINTIFF PRESENTED EVIDENCE WHICH PROVED THAT THE DEFENDANT IS AN UNFIT MOTHER AND NOT A PROPER PERSON TO HAVE THE CARE, CONTROL AND CUSTODY OF THE MINOR CHILD.

The trial court considered this matter carefully and had considerable time to weigh the evidence and enter the proper ruling. The parties first appeared before the court on April 23, 1968. Subsequent hearings were held on June 17, 1968, September 10, 1968, and September 11, 1968. The court entered the decree of divorce on September 24, 1968. The court had an opportunity to thus become acquainted with and to observe the parties in this case more than would be true in the ordinary divorce situation.

The trial court did find that the mother was not a fit and proper person to have custody of the minor child. On November 2, 1967, the defendant left her husband and child and went to Phoenix, Arizona. She previously discussed her leaving with the plaintiff, indicating that she was under such stress, that her family obligations were getting too much for

her and that she had to get away, that she would like to go to Phoenix for a vacation for two weeks. (TR. p. 118, 1-6) Instead of returning home at the end of two weeks, the defendant remained in Arizona until April 14, 1968, when she did return to Utah. (TR. p. 101, 7) The defendant had refused to return to her home although the plaintiff had traveled to Arizona to request her return on two separate occasions. He discussed this matter with her in Arizona on or about December 26, 1967, and on or about March 15, 1968. (TR. p. 118) The plaintiff had also discussed this matter with the defendant over the telephone, and in one telephone conversation he indicated that the baby was sick with a fever. He asked her if she wouldn't come back. Her only reply was, "Can't you take care of the baby?" (TR. p. 119, 18-25) When the plaintiff requested the defendant to return in December, 1967, the plaintiff stated, "I'm not ready to come back yet; I don't know how long before I might even want to come back; I may never want to come back." (TR. p. 118).

The defendant had not made specific arrangements for the care of the baby while she would be gone for the two weeks, let alone the five and one-half months she was gone. The plaintiff had to make the arrangements for the care of the child while the mother absented herself from the home. (TR. p. 123, 22-30 and 124).

The defendant testified that she felt she was losing the grasp on everything that meant anything to her, and that she thought she had to get away to find herself. She felt like she was losing all identity and that no one really cared too much about her, or what happened to her, or what she did. (TR. p. 5, 20-24) She stated to Dr. Jarvis, her psychiatrist, that, "I'm the most insecure person in the world." (TR. p. 39, 5, 6) Dr. Jarvis stated at the hearing that this factor still continued with her to a degree. (TR. p. 39, 10-12) Dr. Jarvis further stated that her response in leaving her child and going to Phoenix was not a healthy response to the situation that

existed. (TR. p. 51, 29) Dr. Jarvis further indicated that he could not guarantee that the defendant would not leave the child and her responsibilities again if the pressures of life re-occured. (TR. p. 54, 18-30) The defendant further testified that she felt she had to leave her daughter before her daughter rejected her too. (TR. p. 73, 6-15).

Dr. Evans, the child's pediatrician, indicated that he had counseled with the defendant on many occasions. He stated that the defendant's performance in the last year, or last ten months, considering her capabilities, had been poor poor and that what the next period of time would be he had no way of knowing; except that the sort of illness that she rightly suspects that she has is not one which is easily cured. Dr. Evans stated that he was speaking of her problems as a parent. He indicated that he agreed with Dr. Jarvis that he could not guarantee that she would not have a lapse back to the condition she was in when he first saw her, which were described as great anxiety, bewilderment, confusion and instability. (Dr. Evans, TR. p. 7 and 8).

The defendant admitted that while she was in Arizona she dated other men. She stated that this was all so that she could "find herself." (TR. p. 99, 20-30 and p. 100) The defendant admitted that she was in the presence of other men and had been dating the month prior to her leaving to go to Phoenix. (TR. p. 97, 7-12) The defendant admitted that on at least four occasions when the baby was 10 or 11 months old, prior to her going to Arizona, she left the baby and went out and stayed until two or three o'clock in the morning. (TR. p. 9, 1-8) The defendant further testified that since she had returned from Arizona she had been dating men, and some of these occasions even involved periods of time when she had the child with her for visitation purposes. (TR. p. 102, 10-23).

The court properly found that it was in the best interest of the minor child that the father be awarded her

custody. The court found in paragraph 7 of the Findings of Fact that:

> "The defendant is not a fit and proper person to have the care, custody and control of the minor child of the parties; she having left the child ... and stayed away by absenting herself from the home and the child for over five months, and in other ways demonstated that she is not able to care for the child and is not a fit and proper person to have the care, custody and control of the child. That the defendant is suffering from a great emotional instability. That her absenting herself from the home was not for the welfare of the child, but for her fear of her inadequacies ... and that she would receive the rejection of her own child, as she felt she has been rejected by others."

CONCLUSION

While the court has announced the doctrine that in divorce cases it will weigh the evidence and may substitute its judgment for that of the trial court, the court stated in MacDonald vs. MacDonald, 120 Utah 573, 236 P. 2d 1066, (1951):

> "Nevertheless, this court should not do so lightly, nor merely because its judgment may differ from that of the trial judge. We adhere to the qualifications set forth in the more recent expressions of this court: 'that judgment will not be disturbed unless the evidence clearly preponderates against the finding of the trial court; or there has been a plain abuse of discretion; or when a manifest injustice or inequity is wrought'."

This rule is further borne out by a similar ruling in Curry vs. Curry, 7 Utah 2d 198, 321 P. 2d 939 (1958). This court in the case of Johnson vs. Johnson, supra, pointed out the valid reasons why it should not overrule the trial court unless there clearly existed evidence which preponderates against his findings, or that there had been an abuse of discretion. It stated:

> "Due to the equitable nature of such proceedings, the proper adjudication of which is highly dependent upon personal equations which the trial court is in an advantaged position to appraise, he is allowed considerable latitude of discretion and his orders will not be disturbed unless it appears that there has been a plain abuse thereof."

The trial court had the opportunity to observe the stability of the parties and to receive testimony from them on four separate days of hearings. These hearings were spread out over a period of five months, and the prime consideration of the court was the custody of the child. There is no evidence that the court abused its discretion in awarding the custody of the child to the father. The ruling of the court does not manifest injustice or inquity. The evidence does not clearly preponderate against the findings of the trial court. Indeed, equity, justice, and the welfare and best interests of the minor daughter of the parties indicate that the trial court should be sustained in its decision to award the custody of the child to the father.

Respectfully submitted,

J. DUFFY PALMER, of and for
HESS, PALMER & VAN WAGENEN
40 South 125 East
Clearfield, Utah 84015

Attorneys for Plaintiff-
Respondent